Supreme Court, U.S.
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No. 93-221

In the Supreme Court of the United States

OCTOBER TERM, 1993

PATRICIA ECHARTE, a minor, by and through her parents and natural guardians, NORMA ECHARTE and PEDRO ECHARTE, and NORMA ECHARTE and PEDRO ECHARTE, individually,

Petitioners,

v.

UNIVERSITY OF MIAMI, d/b/a THE UNIVERSITY OF MIAMI SCHOOL OF MEDICINE, a Florida Corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent, University of Miami, submits the following restated questions presented for review in response to petitioners' statement of questions presented for review because petitioners questions, as stated, are argumentative and, therefore, not in conformance with Rule 14.1(a), Rules of the Supreme Court:

1. Whether FLA. STAT. §§ 766.207, 766.209 (Supp. 1988) are consistent with the Fifth Amendment's proscription against the taking of property without just compensation.

2. Whether FLA. STAT. §§ 766.207, 766.209 (Supp. 1988) are consistent with the Fourteenth Amendment's equal protection guarantee.

3. Whether FLA. STAT. §§ 766.207, 766.209 (Supp. 1988) are consistent with the Fourteenth Amendment's guarantee of due process.

RULE 29.1 STATEMENT

Respondent, University of Miami d/b/a The University of Miami School of Medicine, is a Florida Corporation. Pursuant to Rule 29.1, Rules of the Supreme Court, it states that there are no companies that may be considered to be its parent companies or subsidiaries (except wholly owned subsidiaries).

RULE 29.4(c) STATEMENT

As required by Rule 29.4(c), Rules of the Supreme Court, it is noted that the instant petition for certiorari calls into question the constitutionality of two provisions of Florida Statutes, specifically, §§ 766.207, 766.209, and neither the State of Florida nor any agency, officer, or employee thereof is a party to this proceeding. 28 U.S.C. § 2403(b) may be applicable. Respondent has received notice that the petitioners have served the petition for certiorari on the Attorney General of the State of Florida.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners, Patricia Echarte, Norma Echarte, and Pedro Echarte, have sought this Court's certiorari review of the opinion of the Florida Supreme Court upholding the constitutionality of Florida Statutes §§ 766.207, 766.209 (Supp. 1988), which provide incentives for prompt resolution of medical malpractice claims through voluntary binding arbitration and which provide a contingent monetary cap on non-economic damages in medical malpractice claims when a claimant refuses a defendant's offer to admit liability and arbitrate damages. Petitioners contend that application of the subject

statutes results in an improper taking of property without just compensation in violation of the Fifth and Fourteenth Amendments, violates petitioners' Fourteenth Amendment right to due process, and violates petitioners' Fourteenth Amendment right to equal protection. In its opinion, the Florida Supreme Court definitively established the constitutionality of the statutes under the Florida Constitution's access to courts provisions and discussed that independent state constitutional challenge in detail. It also confirmed the constitutionality of the statute on all other grounds raised, including federal constitutional issues. Although the court did not discuss those findings in detail, the court's specific resolution of the stringent state constitutional access to courts challenge determines — by necessity — the less inclusive challenges raised herein. Petitioners have failed to raise a substantial federal question. In addition, petitioners have failed to establish, as required by Rule 10 of this Court, the existence of conflict between the opinion of the Florida Supreme Court and this Court or other state courts of last resort. Thus, respondent, University of Miami, submits this brief in opposition to the petition for writ of certiorari filed herein and suggests that this case does not warrant certiorari review by this Court.

STATEMENT OF THE CASE

Petitioners' unsubstantiated history regarding an absolute, across-the-board damage cap for all tort actions is nothing more than argument and is wholly irrelevant to the issue before this Court — the appropriateness of this Court accepting certiorari jurisdiction over a decision of the Florida Supreme Court upholding later statutes limited to medical malpractice actions. Their reference to a change in the composition of the Florida Supreme Court and suggestion that it was this change that resulted in a different decision completely ignores the nature of the inquiry and suggests an identity between the absolute across-the-board cap on non-economic damages in all tort actions and the contingent cap in the instant action, which

simply does not exist. If anything, the passage of the 1986 Tort Reform Legislation, which followed earlier tort and malpractice reform legislation in 1975, 1976, and 1985, suggests the Florida Legislature's continuing efforts to deal with an unresolved crisis in the insurance and tort arenas with particular emphasis on medical malpractice. The only relevance of the 1986 Legislation was that it established an Academic Task Force to study the tort and malpractice crisis and prepare reports and recommendations. The Florida Legislature relied upon these reports and recommendations when it enacted the statutes in issue, and the majority of the Florida Supreme Court ultimately considered these reports and recommendations in making its determination on the constitutionality of those statutes.

The Florida Legislature recognized that the state was undergoing a health care crisis. Medical malpractice verdicts were skyrocketing, causing insurance premiums to expand dramatically to the point of becoming functionally unavailable. As a result, physicians in high-risk specialties were limiting their practices; and, the citizens of Florida presently could not afford or even obtain necessary care at any price. Similar issues were prevalent in the general tort insurance industry as well. Thus, in 1986 the Florida Legislature enacted the Tort Reform Act of 1986, which included a number of modifications to existing tort law, including an across-the-board cap on noneconomic damages in all negligence cases. Although that cap was stuck down on Florida constitutional access to courts and right to jury trial grounds, an additional provision relating to abrogation of joint and several liability was upheld in response to challenges based on access to courts and equal protection grounds; and, other provisions relating to punitive damages, remittitur and additur settlement conferences, itemized verdicts and alternative methods for payment of damage awards were upheld against constitutional challenges on other grounds. *Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987). As part of the 1986 comprehensive tort reform legislative package, the legislature established an "Academic Task

Force For Review of The Insurance and Tort Systems" to analyze the medical malpractice crisis and recommend solutions.[1] The Task Force originally was directed to report on its findings and recommendations by March 1, 1988. However, because then-Governor Martinez and legislative leaders recognized the urgency of the medical malpractice and malpractice insurance crisis and the need for an immediate response, they requested an expedited report on the subject of medical malpractice. Accordingly, on August 14, 1987, the Task Force released a "Preliminary Fact-Finding Report on Medical Malpractice." Other Task Force reports, upon which the Florida Supreme Court reviewed and relied, included the Medical Malpractice Reform Alternatives, dated October 2, 1987, Medical Malpractice Recommendations, dated November 6, 1987, and Final Recommendations, dated March 1, 1988.[2]

The Task Force had conducted an extensive study of the malpractice crisis. Contrary to petitioner's assertions, this study was not the result of special interest lobbying, but rather the result of a comprehensive literature research and review, seven public meetings, eight separate research projects, surveys of 1500 randomly selected physicians and 1500 attorneys who regularly handle tort cases, computer analysis of the financial situation of liability insurance carriers, an analysis of Florida civil litigation rates, and a final six hour hearing to preview the preliminary findings from the eight research projects. In the Medical Malpractice Preliminary Fact Finding Report, the Task Force identified the dollar amount of paid

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[1] 1986 LAWS OF FLORIDA, ch. 86-160. The Task Force consisted of three university presidents and two businessmen with distinguished public service records. Additionally, the task force hired a professional staff with expertise in insurance and finance, actuarial science law, economics, and medicine. The Task Force did not include members of special interest groups. Thus, for petitioners to suggest that the legislation in issue was established at the behest of the "powerful medical and insurance industry lobbies" is disingenuous.

[2] *University of Miami v. Echarte*, 618 So. 2d 189, 191 n.11 (Fla. 1993).

claims and the delays, costs, and uncertainty inherent in the tort system as major concerns.[3] As a result of that study, the Task Force recommended a comprehensive program to address the problems underlying the medical malpractice crisis.

In February 1988, the Governor called the Florida Legislature into a special session to address the medical malpractice crisis in Florida. The legislature relied on the Task Force's extensive study, considered the Task Force's recommendations, weighed the various alternatives, balanced the policy reasons supporting each alternative, and promulgated legislation to meet this public need.[4]

The Legislature specifically found that a number of problems contributed directly to the malpractice crisis in the State of Florida, which adversely affects the availability and affordability of health care in Florida. The legislature considered numerous alternative methods to address the many problems. However, after considering every option, the legislature determined that the only way to address the entire crisis was to implement a comprehensive solution, including a contingent cap on non-economic damages and a voluntary arbitration procedure. The contingent cap on non-economic damages was an integral part of this comprehensive legislative response.

Although petitioners refer correctly to the ultimate decision of the majority of the Florida Supreme Court and discuss the dissent, in detail, they fail to discuss the findings of the majority, and they refuse to recognize the basis for those findings.

Even a cursory review of the majority's decision reveals a well-reasoned and in-depth analysis of the constitutional is-

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[3] *Echarte*, 618 So. 2d at 196 n.17.

[4] The preamble to this legislation and the specific legislative findings in support of the legislation are quoted in the Florida Supreme Court's decision in *Echarte*, 618 So. 2d at 191 n.12, 192 n.13, which is reproduced in its entirety in petitioners' appendix.

sues, specifically with respect to the right of access to courts under Florida law, but implicitly applicable to all the issues that are now raised before this Court. The Florida Supreme Court reviewed in detail the Academic Task Force reports upon which the Florida Legislature relied when it enacted the statutes, reviewed the specific legislative preamble to the statutes, and reviewed the Legislative Findings. The court ultimately found that the Florida Legislature had determined both the existence of an overpowering public necessity and the lack of an alternative method of meeting that public necessity other than through enacting the legislation. It also found that the legislature had provided commensurate benefits to claimants whose purported right to recover non-economic damages in excess of $350,000 would be limited by their refusal to accept a defendant's offer to admit liability and arbitrate damages as part of the prompt resolution plan. All necessary conclusions derived from that analysis that support the court's decision become apparent upon reading the majority's decision and reveal the court's proper balance between its power and duty to invalidate legislative enactments that violate the Constitution and the power and duty of the legislature to enact legislation in furtherance of the public welfare. The simple truth of petitioners' assertion of facts and indeed their entire argument is that they would align themselves with the minority justices in the Florida Supreme Court. Their statement of the facts reflects that alignment. Thus, respondent respectfully suggests that this Court review carefully the majority decision, which is the only relevant source from which this Court may determine whether a question meriting this Court's federal constitutional review exists.

REASONS FOR DENYING THE PETITION

1. This petition raises no important question of federal law that has not been, but should be, settled by this Court, nor does it establish that the Florida Supreme Court has decided a federal question in a way that conflicts with applicable decisions of this Court or of another state court of last resort.

This petition should be denied because it lacks any "special and important reasons" for granting it, as required by Rule 10.1 of this Court. There is no conflict between the judgment of the Florida Supreme Court and decision of any other state court of last resort. Likewise, there is no conflict between the judgment of the Florida Supreme Court and this Court. None of the cases petitioners cite in support of conflict deal with the precise issues in this case; they are distinguishable and can be harmonized upon a careful review of the facts and issues raised.

Additionally, the petition raises no question that has not been, but should be, settled by this Court. This Court has denied certiorari review of state supreme court decisions upholding the constitutionality of medical malpractice reform legislation. In those cases, the statutes were considerably more restrictive in their scope; *i.e.*, they contained across-the-board caps on recovery with considerably less "quid pro quo" inuring to the plaintiffs. Those cases raised the issues that are being raised before this Court — equal protection and due process — with the exception of the Takings Clause issue. Inasmuch as the Takings Clause issue, as discussed *infra*, does not raise a substantial federal question in this particular case, and as this Court previously has denied review of similar legislation, there is no reason for this Court to consider the issues again.

2. Petitioners have failed to establish that the Florida Supreme Court's finding that the statutes did not constitute an unconstitutional taking of property without just compensation raises an important federal question that has not been, but should be, decided by this Court.

Petitioners rightly suggest that their first contention is unconventional; however, the contention is not supported by applicable case law. First, petitioners misconstrue this Court's decision in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), as holding that petitioners' unliquidated, contingent action for damages in tort is a vested property right entitled to compensation if taken by state action. Although this Court has suggested that a cause of action is a "species" of property, *id.* at 428, one's property right in any cause of action does not vest until that party obtains a final unreviewable judgment. *Grimesy v. Huff*, 876 F.2d 738, 744 (9th Cir. 1989) (citing *In re Consolidated United States Atmospheric Testing Litig.*, 820 F.2d 982, 988 (9th Cir. 1987), *cert. denied sub nom., Konizeski v. Livermore Labs*, 485 U.S. 905 (1988)), *cert. denied*, ___ U.S. ___ , 111 S. Ct. 1260 (1991); *Hammond v. United States*, 786 F.2d 8, 12, 14 (1st. Cir. 1986)); *see also Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) ("a legal claim affords no definite or enforceable property right until reduced to final judgment"). Accordingly, where, as here, a statute limits recovery to a party who has not yet obtained a final, unreviewable judgment, there can be no "taking" violation of the Fifth Amendment. *See Arrieta-Gimenez v. Arrieta-Negron*, 859 F.2d 1033, 1038 n.2 (11th Cir. 1988); *Hammond*, 786 F.2d at 14 ("We have already found that plaintiff had no vested property right in her tort cause of action, so it is very unlikely there could be a 'taking' here.") Thus, petitioners' argument regarding the Fifth Amendment fails on this threshold issue.

Nevertheless, even if this Court were to determine that petitioners' cause of action were to constitute property, petitioners have failed to establish that the statutes in issue

constitute a "taking." This Court has held that there is no set formula for determining whether compensation is constitutionally due for a government restriction of property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). The Court must engage in an essentially ad hoc factual inquiry. *Id.* (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). This inquiry is based on the following standards:

> The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance. "So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Ibid.* (citation omitted).

Id. (quoting *Penn Central*, 438 U.S. at 124). In this case, petitioners have failed to show that the statutes in issue affect in any way investment-backed decisions. More importantly, these statutes can be characterized best as merely a public program adjusting the benefits and burdens of economic life to promote the common good, rather than a physical invasion by government onto the petitioners' alleged intangible property interest.

The statutes promote the availability and affordability of health care to all Floridians. In addition, the statutes provide malpractice plaintiffs the possibility of recovering *all* their actual medical costs within a very short time, plus recovering attorney's fees *in addition to* their recovery for actual damages, lost earnings, and pain and suffering damages, rather than having to pay them out of the total recovery. Certainly this can be described best as an adjustment of benefits and burdens of economic life, rather than a physical intrusion. Accordingly, petitioners have failed to establish a valid basis under the Takings Clause to merit this Court's discretionary review.

3. Petitioners' equal protection claims fail to present a substantial federal question and fail to establish conflict with this Court or other courts.

Petitioners have failed to raise a substantial federal question regarding their equal protection claim. This Court established in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), that a statutory limitation on liability for a common law cause of action does not violate equal protection so long as the statute's liability limitations are rationally related to any disparate treatment between plaintiffs affected by the act and plaintiffs otherwise similarly situated. *See id.* at 93-94 ("The general rationality of the Price-Anderson Act liability limitations — particularly with reference to the important congressional purpose of encouraging private participation in the exploitation of nuclear energy — is ample justification for the difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other causes."). The Florida Supreme Court considered the equal protection issue in reaching its decision. Though it did not discuss the issue at length, in determining that the statutes in issue did not violate the Florida Constitution's right of access to courts the court necessarily determined that the statutes did not violate petitioners' equal protection rights. *University of Miami v. Echarte*, 618 So. 2d 189, 191 (Fla. 1993). The court determined that the legislation limiting recovery of what are basically arbitrary damages — non-economic "pain and suffering" damages — was rationally related to the strong state interest in providing access to affordable health care for all of Florida's citizens, ensuring that physicians maintain medical malpractice insurance to compensate injured patients for their actual damages, and ensuring that the parties affected by the legislation receive a commensurate quid pro quo — immediate payment of damages, entitlement to attorney's fees — in return for the limitation on those non-economic damages. This Court reached a similar conclusion in *Duke Power*. 438 U.S. at 93 (after determining that a sufficient quid pro quo existed to defeat a due process

challenge, this Court concluded that no equal protection violation existed — "the equal protection arguments largely track those made in support of the due process claim"). Accordingly, because the Florida Supreme Court's decision is firmly supported by this Court's previous rulings, petitioners have failed to raise a substantial federal question.

In addition, this Court consistently has refused to review decisions upholding the constitutionality of malpractice damage limitations in the face of equal protection challenges.[5] This Court should do the same here, for petitioners offer neither authority nor reason for examining whether the statutes here satisfy federal equal protection guarantees. This case simply does not raise a substantial federal question.

Petitioners similarly have failed to establish that the Florida Supreme Court's decision conflicts with decisions of other state supreme courts or this Court. Many states, in addition to Florida, have enacted tort reform legislation affecting medical malpractice claims that incorporate a limitation on recovery in such legislation. These states have determined that recovery limitations, especially limitations on non-economic damages, are a reasonable and proper means of ensuring the availability and affordability of health care for their citizens.[6] However, the

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[5] *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 S.W.2d 517, (La. 1992), *cert. denied*, ___ U.S. ___ , 113 S. Ct. 2338(1993); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1991), *cert. denied*, ___ U.S. ___ , 113 S. Ct. 511 (1992); *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal dismissed*, 474 U.S. 892 (1985) (dismissed by this Court as not raising a substantial federal question); *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977).

[6] *See, e.g.*, ALA. CODE §§ 6-5-544, 6-5-547 (Supp. 1991) ($400,000 limitation on noneconomic damages); ALASKA STAT. § 09.17.010 (Supp. 1991) ($500,000 limitation on noneconomic damages); CAL. CIV. CODE § 333.2 (West Supp. 1992) ($250,000 limitation on noneconomic damages); COLO. REV. STAT. § 13-21-102.5, § 13-64-302 (Supp. 1991) ($1 million limitation on all damages, $250,000 limitation on noneconomic damages); HAW. REV. STAT. § 663-8.7 (1988 & Supp. 1991) ($375,000 limitation on damages for pain and suffering); IDAHO CODE § 60-1603 (1990) ($400,000 limitation on

damage "caps" have received mixed reviews in state courts. In many cases, both state and federal courts have sustained such statutes against a wide variety of constitutional challenges.[7] In

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noneconomic damages, annually adjusted); ILL. ANN. STAT. ch. 70 ¶101 (Smith-Hurd Supp. 1978) ($500,000 limitation on all damages); IND. CODE ANN. § 16-9.5-2-2 (Burns 1975) ($500,000 limitation on all damages); KAN. STAT. ANN. § 60-3407 (Supp. 1991) ($1 million limitation on all damages); KAN. STAT. ANN. § 60-10a02 (Supp. 1991) ($250,000 limitation on noneconomic damages); LA. REV. STAT. ANN. §§ 40:1299.41-48 (West 1991 & Supp. 1993) (limiting recovery of damages in any case to $100,000 from a qualified health care provider and an additional $400,000 from patient's compensation fund); MD. CTS. & JUD. PRO. CODE ANN. § 11-108 (1989) ($350,000 limitation on noneconomic damages); MASS. GEN. L. ch. 231, § 60H (Supp. 1992) ($500,000 limitation on noneconomic damages); MICH. STAT. ANN. § 24A.1483 (Callaghan Supp. 1991) ($225,000 limitation on noneconomic damages, subject to exceptions and adjustments); MINN. STAT. ANN. § 549.23 (West 1988) ($250,000 limitation on intangible losses); MO. REV. STAT. § 538.210 (1988) ($350,000 limitation on noneconomic damages, annually adjusted for inflation); NEB. REV. STAT. § 44-2825 (1988) ($1 million limitation on all damages); N.H. REV. STAT. § 5084-D (Supp. 1991) ($875,000 limitation on noneconomic damages); N.M. STAT. ANN. § 41-5-6 (1989 & Supp. 1991) ($500,000 limitation on all damages, excepting medical care expenses); N.D. CENT. CODE § 26-40.1-11 (1978) ($300,000 limitation on all damages); OHIO REV. CODE ANN. § 2307.43 (Anderson 1991) ($200,000 limitation on all damages); OKLA. STAT. ANN. tit. 76, § 18 (West 1987) (limits recovery to actual medical expenses incurred, in action brought more than three years from incident); ORE. REV. STAT. § 18.560 (1989) ($500,000 limitation on noneconomic damages); S.D. CODIFIED LAWS ANN. § 21-3-11 (1987) ($1 million limitation on all damages); TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1992) ($250,000 limitation on all damages, exclusive of medical expenses); UTAH CODE ANN. § 78-14-7.1 (1987) ($250,000 limitation on noneconomic damages); V.I. CODE ANN. tit. 27, § 166 B (Supp. 1991) ($250,00 limitation on noneconomic damages); VA. CODE ANN. § 8.01-581.15 (1984) ($1 million limitation on all damages); WASH. REV. CODE ANN. § 4.56.250 (1988) (formula limitation on noneconomic damages based on life expectancy and average annual wages); W. VA. CODE § 55-7B-8 (Supp. 1991) ($1 million limitation on noneconomic damages); WIS. STAT. ANN. § 893.55 (West 1983 & Supp. 1991) ($1 million limitation on noneconomic damages, annually adjusted).

[7] *See, e.g., Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 S.W.2d 517 (La. 1992), *cert. denied*, ___ U.S. ___ , 113 S. Ct. 2338 (1993) (upholding statute on state and federal constitutional grounds, certiorari denied on

other cases, certain limitations provisions have been stricken as unconstitutional.[8] State court cases holding damage caps unconstitutional, however, have done so almost exclusively on grounds of perceived inconsistencies with state constitutional provisions. No decision has held squarely a statutory limitation on recovery in tort to be proscribed by federal equal protection guarantees in the absence of independent state constitutional

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petition alleging violation of equal protection); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992) (jury trial, due process, equal protection); *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. 1991), *cert. denied*, — U.S. — , 113 S. Ct. 511 (1992) (state and federal equal protection, state open courts provision, trial by jury, due process); *Robinson v. Charleston Area Medical Ctr., Inc.*, 186 W. Va. 720, 414 S.E.2d 877 (1991) (equal protection, due process); *Etheridge v. Medical Ctr. Hosps.*, 237 Va. 87, 376 S.E.2d 525 (1989) (equal protection, jury trial, due process, special legislation); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989) (jury trial, access to courts); *Davis v. Omitowoju*, 883 F.2d 1155 (3rd Cir. 1989) (equal protection, jury trial, due process); *Rose v. Doctor's Hosp. Facilities*, 735 S.W.2d 244 (Tex. App. — Dallas, 1987), *aff'd*, 801 S.W.2d 841 (1990) (due process, open courts, equal protection); *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal dismissed*, 474 U.S. 892 (1985) (state and federal equal protection, due process); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985) (federal equal protection); *Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374,404 N.E.2d 585 (1980) (due process, equal protection, special legislation, right to jury trial); *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977) (special legislation, equal protection); *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977) (state access to courts, due process, special legislation).

[8] *See, e.g., Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991) (state right to trial by jury; state equal protection); *Morris v. Savoy*, 61 Ohio St. 3d 684, 576 N.E.2d 765 (1991) (substantive due process); *Condemarin v. University Hosp.*, 775 P.2d 348 (Utah 1989) (jury trial, substantive due process); *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988) (jury trial, due process); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) (open courts); *Reynolds v. Porter*, 760 P.2d 816 (Okla. 1988) (special legislation); *Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987) (access to courts provision; upheld on other grounds); *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980) (state equal protection); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978) (state equal protection); *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (equal protection).

bases for the decision. Instead, this Court consistently has denied certiorari review of decisions wherein federal equal protection has been raised.

No conflict exists among state courts or between state and federal courts on the constitutionality of limitations on recovery in malpractice actions as a matter of federal equal protection, especially where, as here, the Florida Supreme Court determined that the legislation was reasonably related to a legitimate state interest, and where the statute provides a sufficient quid pro quo to the parties allegedly adversely affected by the legislation. Accordingly, this Court should decline to review this case.

4. Petitioners' due process claims fail to present a substantial federal question and fail to establish conflict with this Court or other courts.

For the reasons set out in *Duke Power*, 438 U.S. 59, and in the Florida Supreme Court's opinion in this case, 618 So. 2d 189, petitioners have failed to present a substantial federal question regarding their due process claims. *Duke Power* held that legislation such as the legislation in this case must be rationally related to a legitimate state interest to satisfy due process. *See Duke Power*, 438 U.S. at 83 ("the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way"). This Court discussed the issue of whether a legislative limitation on damages requires providing the claimant a commensurate benefit in return to satisfy due process:

> [I]t is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here since [the act] does, in our view, provide a reasonably just substitute [satisfactory quid pro quo] for the common-law or state tort law remedies it replaces.

Id. at 88 (footnote and citations omitted). Thus, if a statute provides a satisfactory quid pro quo, the federal due process test necessarily is met. The Florida Supreme Court considered an even stricter standard in determining that the subject legislation did not violate Florida's access to courts provision of the state constitution. Under *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), the Florida Supreme Court established a two-part test to determine whether a statute satisfied the access to courts provision of the constitution:

> [w]here a right of access to courts . . . where such right has become a part of the common law of the State . . . , the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

281 So. 2d at 4. The Florida Supreme Court determined that the subject legislation met both prongs of the test; *i.e.*, not only did the court determine that the Legislature showed an overpowering public necessity for the limitation on recovery for which no alternative method of meeting the public necessity (availability and affordability of health care) could be shown, but also that the subject legislation provided claimants a "commensurate benefit" in exchange for the right to full recovery of non-economic damages. *Echarte,* 618 So. 2d at 194. Thus, applying the Florida Supreme Court's reasoning to *Duke Power,* the court clearly determined that the statute satisfied federal due process requirements. Accordingly, because the decision comports with the requirements of *Duke Power*, petitioners have failed to raise a substantial federal question on due process.

Petitioners equally have failed to establish that a conflict exists among state courts of last resort or between state courts and federal courts regarding due process. For the reasons stated in the equal protection section, no conflict exists among

courts on whether legislation limiting recovery to medical malpractice tort claimants satisfies due process where, as here, the subject legislation provides claimants a commensurate benefit in return for a limitation on damages. Instead, this Court consistently has refused to review state court decisions affirming the constitutionality of such provisions. Accordingly, there remains no basis or reason for this Court to review this case. It should, therefore, decline to do so.

CONCLUSION

For the foregoing reasons, Respondent, University of Miami, d/b/a The University of Miami School of Medicine, respectfully urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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